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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 ALAN VELAZQUEZ, ) No. ED CV 12-01095-SJO (VBK)  
12 )  
13 Petitioner, ) ORDER TO SHOW CAUSE  
14 )  
15 v. )  
16 )  
17 DOMINGO URIBE, JR., )  
18 )  
19 Respondent. )  
20 \_\_\_\_\_ )

21 On July 3, 2012, Alan Velazquez (hereinafter referred to as  
22 "Petitioner") filed a "Petition for Writ of Habeas Corpus by a Person  
23 in State Custody" pursuant to 28 U.S.C. §2254 ("Petition") in the  
24 United States District Court for the Central District of California.  
25 The Petition is directed to a conviction for second degree murder,  
26 three counts of attempted murder sustained in the San Bernardino  
27 County Superior Court on September 21, 2000. Petitioner was sentenced  
28 to 15 years to life, plus 25 years to life. (See Petition at 2.)

29 Upon initial review, the Court notes it appears that the Petition  
30 is time-barred. Since the Petition was filed after the President  
31 signed into law the Antiterrorism and Effective Death Penalty Act of  
32 1996 (the "AEDPA") on April 24, 1996, the Court's consideration of the

Petition's timeliness is governed by 28 U.S.C. §2244(d), as amended by the AEDPA. See Calderon v. United States District Court for the Central District of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998).<sup>1</sup>

That section provides:

"(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or,

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for

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<sup>1</sup> Beeler was overruled on other grounds in Calderon v. United States District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998)(en banc), cert. denied, 119 S. Ct. 1377 (1999).

1 State post-conviction or other collateral review with respect to  
2 the pertinent judgment or claim is pending shall not be counted  
3 toward any period of limitation under this subsection."  
4

5 Under 2244(d)(1)(A), the statute begins to run at the completion  
6 of direct review in the state courts. On September 21, 2000,  
7 Petitioner was convicted. Petitioner filed a Petition for Review in  
8 the California Supreme Court which was denied on March 19, 2003. (See  
9 Petition at 3.) Thus, Petitioner's conviction became final 90 days  
10 thereafter on June 19, 2003. Petitioner had until June 19, 2004 in  
11 which to timely file a federal habeas petition. Patterson v. Stewart,  
12 251 F.3d 1243, 1245 (9<sup>th</sup> Cir. 2001).

13 Here, Petitioner filed his Petition on July 2, 2012. The  
14 Petition was filed approximately eight years after the statute of  
15 limitations expired and is facially untimely, absent any statutory or  
16 equitable tolling.

17 The running of the AEDPA's one-year time limitation is tolled for  
18 the time period during which a properly filed application for post-  
19 conviction or other state collateral review is pending in state court.  
20 See 28 U.S.C. §2244(d)(2); Evans v. Chavis, 546 U.S. 189, 193-194, 126  
21 S.Ct. 846 (2006); Duncan v. Walker, 531 U.S. 991, 121 S. Ct. 2120  
22 (2001)(The statutory term "other collateral review" refers to other  
23 state collateral review). The statute is tolled from "the time the  
24 first state habeas was filed until the California Supreme Court  
25 rejects the petitioner's final collateral challenge." Nino v. Galaza,  
26 183 F.3d 1003, 1006 (9th Cir.), cert. denied, 529 U.S. (2000).

27 Statutory tolling under AEDPA may include the time between  
28 properly filed state petitions, so long as the prisoner is attempting,

1 "through proper use of state court procedures," to exhaust his state  
 2 court remedies. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999);  
 3 accord, Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 2138 (2002).  
 4 Such "gap tolling," however, is available only insofar as a petitioner  
 5 is pursuing "one complete round of the state's established appellate  
 6 review process." Nino, 183 F.3d at 1005; see also Saffold, 122 S.Ct.  
 7 at 2138; Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001).

8 Here, it appears from the face of the Petition that Petitioner's  
 9 collateral challenges were filed too late.<sup>2</sup> See Ferguson v. Palmateer,  
 10 321 F.3d 820, 823 (9<sup>th</sup> Cir.)(holding that §2244(d) "does not permit the  
 11 reinitiation of a limitations period that has ended before the state  
 12 petition was filed," even if the state petition was timely filed),  
 13 cert. denied, 540 U.S. 924 (2003); Jimenez v. Rice, 276 F.3d 478, 482  
 14 (9<sup>th</sup> Cir. 2001); Wixom v. Washington, 264 F.3d 894, 898-99 (9<sup>th</sup> Cir.  
 15 2001), cert. denied, 534 U.S. 1143 (2002).

16 The Court takes judicial notice of its own files and records and  
 17 notes that Petitioner filed two prior federal habeas petitions in  
 18 cases entitled Alan Velazquez v. Warden, ED CV 03-00744-PA (Mc) and  
 19 Alan Velazquez v. Warden, ED CV 04-00242-SJO (Mc).<sup>3</sup> Judgment was  
 20 entered in Case No. ED CV 03-00744-PA (Mc) on July 15, 2003. Judgment  
 21 was entered in Case No. ED CV 04-00242-SJO (Mc) on March 18, 2004.

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23 <sup>2</sup> The Court notes on pages 3 and 4 of the Petition that Petitioner  
 24 filed a habeas petition in the San Bernardino County Superior Court  
 25 which was denied on November 30, 2009. Petitioner filed habeas  
 26 petitions in the California Court of Appeal and California Supreme  
 27 Court which were denied on February 1, 2010 and October 13, 2010,  
 respectively. These petitions were filed approximately five and a  
 half years after the one-year statute of limitations expired.

28 <sup>3</sup> See Mir v Little Co. of Mary Hosp., 844 F.2d 646, 649 (9<sup>th</sup> Cir.  
 1988).

1 These federal habeas petitions, however, do not toll the statute of  
2 limitations. See Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120  
3 (2001)(habeas petition pending in federal court, as opposed to state  
4 court, does not toll the statute of limitations).

5 The Ninth Circuit has held that the District Court has the  
6 authority to raise the statute of limitations issue sua sponte when  
7 untimeliness is obvious on the face of the petition, and to summarily  
8 dismiss the petition pursuant to Rule 4 of the Rules Governing §2254  
9 Cases in the United States District Courts, so long as the Court  
10 "provides the petitioner with adequate notice and an opportunity to  
11 respond." See Day v. McDonough, 547 U.S. 198, 126 S.Ct. 1675 (2006);  
12 Nardi v. Stewart, 354 F.3d 1134, 1141 (9<sup>th</sup> Cir. 2004); Herbst v. Cook,  
13 260 F.3d 1039, 1042-43 (9<sup>th</sup> Cir. 2001).

14 **IT IS THEREFORE ORDERED** that on or before August 7, 2012,  
15 Petitioner show cause in writing, if any, why the Court should not  
16 recommend that the Petition be dismissed on the grounds of  
17 untimeliness.

18  
19 DATED: July 6, 2012

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/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE